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Alaska's Open Meetings Act – A Guide for Local Governments and School Districts, February 1996, 2nd Edition, Gordon Tans

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EXCERPTS FROM FEBRUARY 1, 2002 MEMORANDUM AND OPINION BY SUPERIOR COURT JUDGE MARK RINDNER REGARDING THE OPEN MEETINGS ACT IN THE CONTEXT OF THE REDISTRICTING BOARD

D. The Board's Process/Open Meetings Act

In addition to reviewing the Final Plan for constitutionality, another critical issue that this court must examine is the Board's process itself. The Board's creation and process is governed by Article VI of the Alaska Constitution. As discussed earlier, in August 2000, the Board was constituted and began preparations for the redistricting process. The census results were reported to the State on March 19, 2001, and draft plans were adopted by April 18, 2001. The Board held public hearings throughout the state and gathered comments on the draft plans. By a three to two vote, the Plan was approved and released by Proclamation dated June 18, 2001.

Article VI, Section 10, of the Alaska Constitution specify the manner in which the Redistricting Board must proceed. That provision states:

> **Section 10. Redistricting Plan and Proclamation.** (a) Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.
>
> (b) Adoption of a final redistricting plan shall require the affirmative votes of three members of the Redistricting Board.

The Alaska Supreme Court has also ruled that the Open Meetings Act and the Public Records Act apply generally to the activities of the Board.[1] The requirements of the Open Meeting Act are set forth in AS 44.62.310-.312 (the "Open Meeting Act"). Additional requirements that the Board must follow also are set forth in the Public Records Act.[2]

[1] The Alaska Supreme Court, however, has "decline[d] to determine whether an independent constitutional basis exists for ensuring public access to the Board's meetings." Hickel, 846 P.2d at 57.

[2] See AS 40.25.100-.220.

The Open Meetings Act states, "[a]ll meetings of a government body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law"[3] It further requires that reasonable public notice be given.[4] In addition, a "meeting" is defined as "a gathering of members of a governmental body when...more than three members or a majority of the members, whichever is less, are present"[5]

The Public Records Act allows, unless specifically provided otherwise, that "the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours."[6]

Violations of the Open Meetings Act or the Public Records Act do not automatically void the Final Plan, if this court determines that public interest serves otherwise.[7]

. . . . .

While the Board is free to adopt its own procedures, it is not afforded unfettered discretion during the redistricting process. The Board must comply with the Open Meetings Act, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution. Beyond that, the Board has freedom to conduct its proceedings in a manner that it believes best facilitates the formulation of a final redistricting plan. We thus turn first to the Open Meetings Act and examine the Board's compliance with such.

1. Open Meetings Act/Public Records Act

The Plaintiffs contend that the Board's adoption of the Plan violated the Open Meetings Act and the Public Records Act for numerous reasons. They argue that the Board members improperly: 1) took "straw" votes by e-mail or phone; 2) met with Alaskans For Fair Redistricting ("AFFR") representatives and legal counsel in meetings closed to the public and to any non-AFFR member and any person not aligned by political party with the Board members involved in these meeting and the AFFR representatives; 3) communicated amongst themselves in numbers of three or more via e-mail or telephone with regards to issues that are specific constitutional duties of the Board and should have been done in a public meeting; and 4) communicated amongst themselves in number of three or more via members of the Governor's Office, Department of Law, or members of the Board's staff regarding specific issues that were required to be addressed in a public meeting.

The Alaska Supreme Court has ruled that the Board must comply with the Open Meetings Act.[8] As previously discussed, the Open Meetings Act requires that all meetings of a governmental body of a public entity of the state are open to the public, unless provided otherwise.[9]

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[3] AS 44.62.310(a).
[4] See AS 44.62.310(e).
[5] AS 44.62.310(h)(2)(A).
[6] AS 40.25.110.
[7] See Hickel, 846 P.2d at 57. Since Hickel, the Open Meetings Act has been amended to specifically incorporate this concept. See 46-48 infra.
[8] See Hickel, 846 P.2d at 57.
[9] See AS 44.62.310(a).

Reasonable public notice of meetings must be given.[10] "Meetings" are defined as when three or more Board members are present,[11] or the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity.[12]

The Open Meetings Act specifically allows attendance and participation at meetings by members of the public or by members of a governmental body by teleconference.[13] If practicable, agency materials that are to be considered at the meeting shall be made available at the teleconference locations.[14]

The Public Records Act requires that unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours.[15] In addition, the public agency "is encouraged to make information available in usable electronic formats to the greatest extent possible."[16]

Action taken to the contrary of the Open Meetings Act is voidable.[17] However, according to AS 44.62.310(f), this court is not required to void the Final Plan simply because of Open Meeting Act violations:

> A court may hold that an action taken at a meeting held in violation of [the Open Meetings Act] is void only if the court finds that, considering all of the circumstances, the public interest in compliance with [the Open Meetings Act] outweighs the harm that would be caused to the public interest and to the public entity by voiding the action.

In making this determination, the court must consider the following: 1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided; 2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided; 3) the degree to which the public entity, other governmental bodies, or individuals may be exposed to additional litigation if the action is voided; 4) the extent to which the governing body, in meetings held in compliance with the Open Meetings Act, has previously considered the subject; 5) the amount of time that has passed since the action was taken; 6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action; 7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of the Open Meetings Act; 8) the degree to which violations of the Open Meetings Act were willful, flagrant,

[10] See AS 44.62.310(e).
[11] See AS 44.62.310(h)(2)(A).
[12] See AS 44.62.310(h)(2)(B).
[13] See AS 44.62.310(a).
[14] See AS 44.62.310(a).
[15] See AS 40.25.110(a).
[16] AS 40.25.115(a).
[17] See AS 44.62.310(f).

or obvious; and 9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).[18]

This court has previously ruled that the Board violated the Open Meetings Act by using e-mail among three or more Board members to discuss Board business. See Order of January 3, 2002. These e-mails primarily concerned discussions regarding the locations of the public hearings that were to be held regarding the proposed plans initially adopted by the Board. Additional e-mails among Board members concerning other procedural matters on administrative topics also appear to have been sent. There is no evidence that the Board utilized such group e-mail to discuss the actual redistricting itself. There is no indication that there was any serial communication among Board members either by e-mail or by other forms of communication to discuss Board business among three or more Board members.

The Board decided in the process that Board members could meet individually with members of the public to discuss the redistricting process. All members of the Board did this with a wide variety of public and private individuals. This is not a violation of the Open Meetings Act. There is also some indication that on a few occasions two Board members may have met to discuss matters regarding redistricting. Indeed, Board members often worked in groups of two as they sought to develop redistricting plans or to improve on those plans. Again, this is not a violation of the Open Meetings Act.

Each of the Board members testified that they individually did not violate the requirements of the Open Meetings Act. They further testified that they did not observe any violation of the Open Meetings Act by other members of the Redistricting Board. The court finds the testimony of each of the Board members to be credible.

Upon considering the facts and evidence and the factors set forth in AS 44.62.310(f), discussed previously, the court finds that the Board's violations of the Open Meetings Act through the use of e-mail is insufficient to void the final redistricting plan and does not require any sanction be imposed. The use of the group e-mails in question was for planning and administrative purposes rather than a substantive discussion of the Redistricting Plans themselves. This court recognizes that the Board was under great time constraints through the redistricting process. The use of e-mails appears designed to save time and only appears to involve planning issues rather than a substantive discussion of the Redistricting Plans themselves. While even such planning decisions, particularly regarding where the Board would hold its public hearings, are covered by the Open Meetings Act, this court concludes that considering all of the circumstances the public interests in requiring compliance with the Open Meetings Act does not outweigh the harm that would be caused to the public interest by voiding the entire Redistricting Plan on this basis. See Hickel, 846 P.2d at 56-57.

[18] AS 44.62.310(f)(1)-(9).

EXCERPT FROM SUPREME COURT ORDER OF MARCH 21, 2002 REGARDING OPEN MEETINGS ACT IN CONTEXT OF 2002 REDISTRICTING BOARD ACTIVITIES

Assuming that the trial court was correct in finding that some of the board members' e-mail exchanges violated the Open Meetings Act, we agree with the[19] trial court that no remedy is appropriate. We hold that the superior court properly concluded that, based on the factors set out in AS 44.62.310(f), "the public interest[] in requiring compliance with the Open Meetings Act does not outweigh the harm that would be caused to the public interest by voiding the entire Redistricting Plan on this basis."

Because we hold that the superior court permissibly refused to grant any remedy for the particular e-mail exchanges it found to violate the Open Meetings Act, we need not address whether these e-mail exchanges actually violated the Act. We further conclude that the superior court did not err by failing to find additional violations of the Act.

19 The Open Meetings Act is set out in AS 44.62.310 and AS 44.62.312.

ALASKA'S OPEN MEETINGS ACT
A GUIDE FOR LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

February 1996
2nd Edition

By Gordon J. Tans

PREFACE

The first edition of this publication appeared in 1992. In 1994 the Alaska State Legislature passed significant amendments to AS 44.62.310-.312, popularly known as the Open Meetings Act, which is reprinted in the Appendix. Among other changes, the legislation clarified the definitions of "governmental body" and "meeting" coming within the coverage of the act. Sweeping changes were made to the law of remedies available for violation of the act. These legislative changes render much of the first edition of this publication obsolete and make this second edition necessary.

No Alaska Supreme Court decisions applying the "new" act have yet been reported. It will take some time before court cases applying the amended act work their way through the court system. Court cases applying the "old" act are still cited in this publication when they appear to have continuing relevance.

This publication makes reference to many court decisions from several different courts. Generally, only those opinions from the Alaska Supreme Court (cited as Alaska) would be considered binding precedents. Cases cited from other states, or from the Superior Court (cited as Alaska Super. Ct.) or the U.S. District Court for Alaska (cited as D. Alaska) are cited for illustrative purposes. Although those cases are helpful in understanding how the Open Meetings Act may be interpreted, they are not precedents binding on any other court's interpretation of the act.

This publication is intended to provide accurate and authoritative information in regard to the subject matter covered. It is made available with the understanding that the author and publisher are not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

I. INTRODUCTION TO ALASKA'S OPEN MEETINGS ACT

A. Meetings Are Open To The Public

Alaska's "Open Meetings Act" ("OMA"), AS 44.62.310--.312, requires meetings of legislative or administrative governmental bodies to be open to the public. The essence of the OMA is stated in its first sentence:

> All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.

AS 44.62.310(a).

The OMA is made specifically applicable to all municipalities by AS 29.20.020 and AS 44.62.310. School boards are also made subject to the OMA by AS 44.62.310.

The Open Meetings Act, as in effect in February 1996, is reprinted in the Appendix.

B. State Policy Regarding Open Meetings

State law expresses a strong policy in favor of opening governmental meetings to the public. State policy says government exists to aid in the conduct of the people's business; government actions should be taken openly and deliberations conducted openly; the people do not yield their sovereignty to government agencies; the people do not give public servants the right to decide what is good for the people to know and not good for them to know; and the right of the people to remain informed shall be protected so the people may retain control over the government. AS 44.62.312(a). Further, the OMA is to be narrowly construed to avoid unnecessary executive sessions and exemptions from coverage of the act. AS 44.62.312(b).

This statement of policy is quoted often by the courts when interpreting the OMA. It provides a very strong basis for liberal court interpretations of the OMA in favor of openness. The policy of the OMA should also be considered by local officials whenever they attempt to interpret the act or apply it to their own operations.

II. WHO IS AFFECTED BY THE ACT?

The Open Meetings Act requires that meetings be open to the public. To whom does this requirement apply?

A. Public Entities

The OMA applies to every "governmental body" of a "public entity." Public entities include all municipalities, all school districts, public authorities and corporations, and governmental units of political subdivisions of the state.[1]

B. Governmental Bodies

For OMA purposes a "governmental body" means an assembly, council, board, commission, committee, and any other similar body of every city, borough, unified municipality, and school board. Both home rule and general law cities are covered equally. By its terms, the act also applies to members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.[2]

The OMA draws a distinction between two types of governmental bodies: those with authority to establish polices or make decisions for the public entity, and those with authority only to advise or make recommendations to the public entity. Both of these types of bodies are covered by the OMA, but the distinction does affect the way a "meeting" is defined, Section III. below, and also affects the remedies that will be available for violations of the OMA, Section VII. below.

C. Specific Examples

It is important to note that a body does not have to have any decision-ma king power to be subject to the OMA. It is sufficient that it be charged with giving advice or making recommendations on matters of public concer n.

Certain bodies are easy to categorize as policy-making or decision-making bodies. Obviously included in this category are borough assemblies, city councils, school boards, boards of adjustment, and boards of equalization. Each of these is easily characterized as a "governmental body" with decision-making authority.

Other bodies may at times have policy-making and decision-making authority and at other times have only advisory authority. The functions assigned to each board, committee, or commission should be examined to determine if it has some authority to make policy or decisions binding on the government. To ensure consistent compliance with the OMA, any body that has such authority, even if only occasionally, should probably be treated as though it is always exercising policy-making and decision-making authority. Examples of such bodies might include planning and zoning commissions, port authority boards, service area boards and similar bodies.

An example of a body that does not have authority to make policy or decisions for the governmental entity would be an advisory neighborhood council, like the community councils in the Municipality of Anchorage.

Alaska Supreme Court decisions have held that some not so obvious entities are governmental bodies covered by the OMA. For instance, the following are or may be covered: a local tenure committee formed to advise the administration of the University of Alaska, [3] a gathering of municipal assembly members at a developer's office for an informal discussion of a proposed development, [4] and a joint federal/state advisory task force (including both agency and non-agency members) formed to give advice to administrative agencies about the terms of proposed leases.[5]

D. Who Is Not Covered?

1. Individuals

It is clear that one assembly member, council member, board member, or other individual member of a body may meet alone with members of the public or lobbyists to discuss matters of public business without violating the OMA.[6] The extent to which more than one official may gather to discuss public business is discussed below in Section III. Whether a mayor who is not a member of the governing body may lobby members of the body is considered below in Section III.A.4.

2. Employees and staff

Staff meetings and other gatherings of employees of the public entity are expressly exempt from coverage under the OMA.[7] Thus a weekly staff meeting of department heads and the mayor or municipal manager, for example, is not a governmental body covered by the act. The Alaska Supreme Court also held that everyday dealings of public employees with each other and with members of the public in day-to-day conduct of government business are not "meetings" of "bodies" and that such employees are not "governmental units."[8]

However, sometimes an employee may be appointed to a board or committee that has either decision-making authority or advisory authority for the public entity. In such cases the board or committee is covered by the OMA. The presence of one or more employees on such a body will not exempt it from the act.

3. Quasi-judicial bodies solely when making decisions

Every municipality or school district may, from time to time, convene meetings of quasi-judicial bodies to make decisions in adjudicatory proceedings. "Quasi-judicial" means court-like. Examples of quasi-judicial bodies include boards of adjustment, boards of equalization, boards of appeals, and disciplinary boards. Sometimes other bodies may also sit as quasi-judicial bodies, such as the assembly, council, planning and zoning commission, and school board. Such bodies are exempt from the OMA when meeting *solely* to make a decision in an adjudicatory proceeding.[9] An

"adjudicatory proceeding" is one in which the rights of specific, identified individuals are being determined, such as a request for a zoning variance, an appeal of a tax assessment, or consideration of a contract termination.

To be exempt from the OMA means that such bodies, in such cases, may meet in executive session to deliberate and make a decision in the pending case. If the meeting is convened *solely* for that purpose, public notice is not required. However, if other public matters are also addressed at such a meeting, then public notice is required and the other requirements of the OMA must be met as to the other matters to be addressed.

4. Organizational votes

The OMA does not apply to votes required to organize a governmental body.[10] Organizing votes are those that elect the leaders or officers of the body, such as the mayor, mayor pro tempore, chair, vice-chair, secretary, parliamentarian, and the like.

5. Meetings of membership organizations

Public entities are frequently members of other organizations, like the Alaska Municipal League, Alaska Association of School Districts, National League of Cities, and so on. Sometimes the body, *e.g.*, council, board, or commission, or the members of those bodies will themselves be members of other organizations. These membership organizations may be national, state, or local in scope.

The OMA does not apply to meetings held for the purpose of participating in or attending gatherings of such membership organizations if the public entity, the body, or the member of the body is a member.[11] However, this exception only applies if no action is taken and no business of the governmental body is conducted at the meeting of the membership organization.

6. Hospital staff

Also exempt from the OMA, and of interest to some municipalities, are meetings of a hospital medical staff and meetings of the governing body or any committee of a hospital when meeting solely to act upon matters of professional qualifications, privileges or discipline.[12]

III. WHAT IS A MEETING?

The OMA has two definitions of "meeting" that differ significantly. One definition is applied to decision-making or policy-making bodies, and the other definition applies to advisory-only bodies. The differences between these two kinds of bodies is discussed in Section II.C. The different definitions require each kind of body to be discussed separately.

A. Meeting Of A Decision-Making Or Policy-Making Body

For a decision-making or policy making body, the OMA defines a meeting to be:

> a gathering of members of a governmental body when more than three members or a majority of the members, whichever is less, are present, [and] a matter upon which the governmental body is empowered to act is considered by the members collectively . . . .[13]

1. A meeting may take any form

There is no particular format for determining when a gathering becomes a meeting under the OMA. In fact, if a sufficient number of members are present any gathering may become a meeting subject

to the act, including dinner before or coffee after a formally scheduled meeting, if public business is considered. Informal gatherings are treated the same as formally called meetings. Work sessions are treated exactly the same as regular meetings. Furthermore, it does not matter whether the government called the meeting, an individual or private business called the meeting, or nobody called the meeting. No matter where, when, or how it occurs, it is a meeting if a sufficient number of members of a covered body get together and collectively consider a subject upon which the body is authorized to act. In this context, transacting public business is broadly construed. It includes *every* step of the deliberative and decision-making process, including work sessions, investigations, fact-gathering, lobbying and simple discussions of matters of public business.[14]

2. Four members or a quorum make a meeting

Before the 1994 amendments to the OMA there was confusion about how many members of a body could meet without violating the OMA. The amendments have greatly clarified this issue.

For a body with authority to make decisions or policy for the entity, it takes four members or a quorum of the body, whichever is **less**, to make a meeting. A gathering of less than that number is not a meeting according to the definition.

The typical city council has six or seven members, depending on whether the mayor is a member of the council. In either case, a typical quorum is four. Thus, a meeting will occur when four members of a typical city council are present and collectively consider a matter of city business.

For any larger body, like any assembly or school board with eight or more members, the number of members that would constitute a meeting is always four.

For a smaller body, like a subcommittee or board with fewer than six members, any gathering of a quorum of the body will constitute a meeting if they collectively consider any matter upon which they have the power to act.

3. Telephone polling or serial meeting

One commonly used device is the "polling" of members, often done by telephone. One member, or a staff person, will speak to all the members of the body, one at a time, to discuss an issue. Frequently the caller will either determine how the individual feels about the issue, or will attempt to influence the way the individual feels about the issue. In this manner the caller may pre-determine what the outcome of the issue will be, without discussing it at a public meeting. This is sometimes called a "serial meeting."

Even though there are not more than three members present at any one time, and this situation does not precisely fit within the OMA's new definition of "meeting," there is still considerable risk this device might be considered an illegal meeting in violation of the OMA. The reason for this risk is that the series of telephone calls can have the effect of circumventing the OMA by determining the outcome of a vote before (or without) a meeting without a public discussion.

Applying the law before the 1994 OMA amendments, two courts have concluded a series of individual conversations may amount to an illegal meeting. A Superior Court judge in Juneau concluded that a series of telephone calls about nominees for appointment to advisory committees was an illegal meeting.[15] The Supreme Court in *Hickel v. Southeast Conference*[16] upheld a trial court finding that several one-on-one conversations by reapportionment board members, coupled with a lack of substantive discussion in a public meeting, was sufficient to establish that business was being conducted outside scheduled meetings in violation of the OMA.

The same result might be reached under the act as amended in 1994 because the strong public policies that motivated those courts are still present in the act. In the context of the question of whether a quorum or less than a quorum could constitute a meeting, the Alaska Supreme Court has

said:

> Given the strong statement of public policy in AS 44.62.312, the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA.[17]

Thus, if public business is being conducted outside the public scrutiny, then there is danger the court might conclude the OMA is being violated, regardless of how many members of the body are involved. It is not a certainty that the telephone poll or serial meeting will be held to be an illegal meeting after the 1994 amendments, but the risk is great enough that cautious public entities should not use this device to conduct any business.[18]

The questionable telephone poll should be distinguished, however, from some perfectly legal communications that appear to be similar. Because by definition three or fewer members of a large body may meet privately without constituting a "meeting" in violation of the OMA, then it seems quite logical that they could also do so by telephone without violating the act. If the members are doing nothing more than exchanging views on an issue, then there would seem to be little chance of their activity circumventing the OMA, and no violation would occur. However, when the private discussions have the purpose and effect of eliminating public discussion of the same issues and predetermining the outcome of a vote, then the OMA is potentially circumvented and the risk that a violation has occurred is present. It is not easy to determine when one crosses over that line from legal discussion to illegal meeting. Caution should be exercised in this area.

It is also clear that a member of the public may privately contact each member of the body without violating the OMA.[19] Thus, a constituent may use the telephone to lobby each member of the body, one at a time, and may even attempt to count the number of votes for and against the issue in question. As long as that individual is not acting as the agent for the public entity or a member of the body there should be no problem. An individual has a constitutional right to petition the government and attempt to influence the outcome of decisions. On the other hand, if the individual is in reality acting as an agent of the public entity, serving as a go-between among the members of the body, then it appears there is an attempt to circumvent the OMA. In this context the activity stands the same risk of being found to be an illegal serial meeting as the telephone poll conducted by a member of the body or the staff.

4. Lobbying by the mayor

What about the mayor lobbying the council or assembly? Is the mayor a member of the body such that it is improper to call all the members of the council or assembly to lobby for a particular matter? In second class cities and some home rule municipalities it is clear the mayor is member of the governing body.[20] In these municipalities the mayor's activity would clearly present the risk of being found to be an illegal serial meeting if a sufficient number of other members of the body are contacted.

The result of the mayor's lobbying activity is not so clear, however, in boroughs, first class cities and those home rule municipalities where the mayor is by law not a member of the governing body.[21] Although not a member of the governing body, the mayor is nevertheless often the presiding officer of the body or the chief executive officer of the municipality, or both,[22] and will sometimes vote with the council or assembly in the case of a tie.[23] In these circumstances, some municipalities, especially those without a manager plan of government, consider the mayor's office more of a separate and equal branch of government rather than part of the governing body. There is some justification for this point of view given the mayor's veto power and other distinctions drawn between the office of mayor and the office of assembly or council member. As a non-member of the governing body, and perhaps a separate and equal branch of government, may a mayor be allowed to privately contact all members of the governing body and attempt to influence the outcome of governing body decisions? Just how the Alaska Supreme Court will respond to this question is not known. It might conclude the mayor is allowed to do so because the mayor is not a member of the body, but it is also possible the

court might view the mayor as simply an agent of the governing body serving as a go-between facilitating an illegal serial meeting. Such activity by the mayor might have some effect of circumventing the policy that governmental units should conduct deliberations and take actions openly, so there is some risk that a mayor's private lobbying of four or more members or a quorum of the governing body will be found to be a violation of the OMA. Proceed with caution under the advice of the municipal attorney in this area.

5. Teleconference meetings

Telephone conference meetings are allowed.[24] Both members of the body and the public are authorized to participate from remote locations. Presumably, speaker phones must be used so all persons present in every location may hear the proceedings and participate. Materials to be considered must be made available at teleconference locations if practicable. Votes at a teleconference meeting must be taken by roll call so all will know how each member votes. Public notice of teleconference meetings must include notice of the location of the teleconference facilities that will be used.

The Supreme Court has, somewhat reluctantly, approved the practice of allowing citizens to phone in comments to a public meeting that is held at a single site. The court did not consider this to be a teleconference meeting, and agreed that it had the effect of expanding public access consistent with the provisions of the OMA.[25]

6. Social gatherings

The OMA does not apply to purely social gatherings of members of a covered body. A meeting only occurs when the members collectively consider a matter of public concern they could act on. However, experience suggests it is very difficult to have a purely social gathering of politicians. The talk may soon turn to public business, and when it does the OMA will come into effect if a sufficient number of members are present. The key point to remember is that every step of the public decision making process must be open to the public and, if a discussion at a social gathering tends to circumvent that policy, it is probable a violation has occurred. Even if the social gathering is public, a violation can occur when public business is discussed if reasonable public notice and an opportunity to be heard is not given. There are only two ways to guarantee the OMA will not be violated at a social gathering: (1) don't attend if four or more members or a quorum of the body will be present, or (2) never discuss public business at social gatherings. Discussing public business at a social event with other members of a government body is an invitation for trouble with the OMA.

B. Meeting Of An Advisory-Only Body

As noted above, the definition of a "meeting" for a body that only gives advice and recommendations differs from that for a decision-making body. For a body that only has authority to advise or make recommendations but has no authority to establish policies or make decisions, a meeting is defined to be:

> a gathering of members of a governmental body when the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act . . . .[26]

1. A meeting is prearranged

For an advisory-only body a meeting occurs when the members gather by prearrangement for the purpose of considering a matter upon which the body is empowered to act. Chance encounters by members of the body do not constitute meetings, even if the members discuss a matter about which the body has authority to give advice or make recommendations. Gatherings for some purpose other than the business of the body are likewise not meetings as defined by the OMA, even if substantive discussions take place.

However, a prearranged gathering for the purpose of any step of the deliberative process will be considered a meeting. As is the case with decision-making bodies, a meeting of an advisory-only body will include *every* step of the deliberative and decision-making process, including a work session, investigation, fact-gathering, and simple discussion of matters of public business,[27] if the gathering is prearranged for one of those purposes.

2. Any number of members can constitute a meeting

Unlike a decision-making or policy-making body, there is no exception for a gathering of a small number of members of an advisory-only body. A gathering of two or more members of an advisory-only body will be a meeting under the OMA when it is prearranged for the purpose of considering the business of the body.

3. Telephone polling

The comments in Section III.A.3 about telephone polls and serial meetings apply with equal force to advisory-only bodies.

4. Teleconference meetings

Teleconference meetings are authorized for advisory bodies. The comments in Section III.A.5 about teleconference meetings apply equally to advisory-only bodies.

5. Social gatherings

A social gathering that includes members of an advisory body will not be considered a meeting, even if the members discuss matters about which the body has authority to give advice. This is so because a social gathering, by common understanding of that term, would be for social purposes and not prearranged for the purpose of conducting the body's business.

However, convening a "social" gathering for the hidden purpose of conducting the body's business will be viewed as a subterfuge, and a court will likely have no trouble concluding that such a "social" gathering is, in fact, a prearranged meeting held in violation of the OMA.

IV. WHAT NOTICE IS REQUIRED?

A. Reasonable Notice

Generally, the OMA requires that "*reasonable* public notice" be given for all meetings to which it applies.[28] It is sometimes assumed that 24 hours' notice of a meeting is sufficient because AS 29.20.160, and many city charters and codes, authorize special meetings on 24 hours' notice to the members. Usually this assumption will be wrong, however. It is entirely possible to comply with this members' notice requirement and still violate the OMA public notice requirement. To determine what public notice is reasonable, all of the circumstances must be considered.

If your municipality or school district has specific notice requirements, they must be satisfied. Failure to meet notice requirements established by internal guidelines or regulations will be strong evidence of failure to give reasonable notice, and has led at least one court to a finding the OMA was violated.[29]

One important case for understanding what reasonable notice means is *Tunley v. Municipality of Anchorage School District*.[30] In *Tunley* the court interpreted the phrase "maximum reasonable public notice" contained in the Anchorage Municipal Charter. The Anchorage School Board gave five days' notice, published in the local paper, of a meeting at which it intended to decide to close two specific

schools. There had already been considerable news coverage of the Board's consideration of school closures, including the two schools in question. However, the court said that in light of the impact the decision would have on the children's and the parents' interest in the maintenance of neighborhood schools, "Five days is not sufficient time for appropriate preparation of opposition concerning an issue of this complexity and importance."[31]

Therefore, the more complex and important an issue is, the more public notice must be given in order to meet the reasonableness standard. Unless a very long period is chosen (three months? six months?), it is impossible to say that any given time period will provide adequate public notice in *all* circumstances. The circumstances surrounding each issue must be judged independently and an appropriate period for reasonable notice chosen.

Under true emergency circumstances, however, the period of reasonable notice may be very short, possibly even no advance public notice, depending on the circumstances and the need for *immediate* action.[32] Whether a true emergency exists, which would justify little or no notice, is a question that will depend on the facts of each case. In the absence of compelling facts, a court will be inclined to find no emergency exists and require advance notice. It would seem possible and reasonable even under emergency circumstances, however, to at least post notice and to call the local news media, if any, to notify them of the pending meeting.

No specific guidelines can be given to test how much notice is reasonable, but certain general rules of thumb may be stated. For instance, if an item is controversial or complicated, plenty of public notice should be given. If an item is likely to be contested (like the granting of a permit or a lease where there are competitors for the same right), then more, rather than less, public notice should be given. Matters that truly are simple or unimportant may be taken up with less public notice, but never without at least advance public notice of the meeting. Emergency matters may be taken up with less notice, depending on the severity of the need to take immediate action. When in doubt, provide more public notice.

B. Specific Requirements

In addition to meeting the general reasonableness standard, the public notice must meet a number of specific statutory requirements.[33] The notice must include the date, time, and place of the meeting. If the meeting will be by teleconference, the location of the facilities must also be stated.

The notice must be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. In addition, notice may be given by print and broadcast media.

Very importantly, notice should be provided in a consistent fashion for all meetings. If notice is provided in an inconsistent manner, the public will likely become confused about how to find out about meetings of the body, and the court will likely find such notice to be unreasonable.

C. Does The Issue Have To Be Listed Specifically On The Agenda?

The question of whether a matter to be considered must be listed specifically on a published or posted agenda presents another facet of the requirement of reasonable public notice. Important, complex, or controversial issues should be specifically identified in the advance notice of the meeting and listed on the agenda.

In *Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*,[34] the court again addressed Anchorage's "maximum reasonable public notice" requirement. In this case, the question was whether port commission consideration of a terminal use permit had to be specifically mentioned on the official agenda posted in advance of the meeting. The issue had been taken up by the commission under the category of "items not on the agenda." The Supreme Court noted that the Anchorage public notice requirement is similar to the OMA's "reasonable public notice" standard and

stated, "The timing and specificity of 'reasonable notice' is necessarily dependent upon the complexity and importance of the issue involved."[35] The court declined to decide whether the notice was reasonable in that case, sending the matter back to the trial court to make factual findings about just how complex and important the issuance of that particular permit was.

It is important that public notice be given clearly. In *Hickel v. Southeast Conference*[36] confusing public notices and display advertisements were a factor leading the court to conclude that notice of a meeting was not reasonable and, therefore, violated the OMA. The ads were not clear about whether a "meeting" or a "hearing" was going to occur.[37]

The important point to be realized here is that under some circumstances the reasonable notice requirement will be violated by the consideration of complex or important items not specifically and clearly listed on the agenda of an otherwise properly called and noticed meeting. Amending the agenda at the beginning of a meeting will not cure a defect of this nature because it will not provide timely advance notice to the public.

The same general rules of thumb described in Section IV.A. above may be applied to the question of whether a topic must be specifically listed on the agenda, and the following rule should always be followed: When in doubt, list it on the published agenda well in advance of the meeting.

D. Notice To Specific Individuals

Although not actual an OMA requirement, notice should be provided to specific persons whose individual rights are at stake in an issue to be considered. For example, participants in a zoning application or an appeal of any kind must receive plenty of notice of the meeting. So should someone who may be awarded or denied a contract, lease or similar privilege. Be especially careful to provide notice to someone whose rights or privileges stand to be terminated or revoked (such as under an employment agreement, lease, contract, permit or license.) Ample advance notice should be given to comply with constitutional due process requirements, and also for the practical purpose of reducing the likelihood of a claim of OMA violation by a person who may be unhappy about the results of the meeting.

E. Notice To Subjects Of Executive Sessions e

The topic of executive sessions is discussed in more detail in Section VI. below, but, on the question of notice, there is a special requirement that applies only to executive sessions called under AS 44.62.310(c)(2) to discuss subjects that tend to prejudice the reputation and character of a person. A body's right to hold an executive session on such a matter is subject to the right of the person in question to demand public consideration instead of an executive session. In *University of Alaska v. Geistauts*[38] the court found the OMA implies an obligation to provide adequate notice of the meeting to the individual whose reputation and character may be called into question. The purpose of the notice is to afford that person the opportunity to request a public discussion, as is his right. Furthermore, in order to adequately protect that right, he must be specifically advised that he has the right to request that the meeting be open to the public. If the person requests an open meeting, an executive session may not be held.

F. Notice Of Teleconference Meetings

If a meeting will be held by teleconference, the notice must state the location of any teleconferencing facilities that will be used. Of course this means that if a remote location is being used at which the public will be allowed to gather and participate, notice of such a location must be given.

The Alaska Supreme Court has recognized a distinction between a true teleconference and the situation in which one person, *i.e.*, a citizen, participates in the meeting by telephone. The practice of allowing a citizen to phone in comments to a meeting held at a single location was approved because it had the effect of expanding public participation consistent with the goals of the OMA.[39] No

particular notice can be given of the locations from which such calls can be made because they may be made from anywhere. However, if such calls are going to be accepted, public notice should be given of that fact and how a person may properly place such a call.

V. PUBLIC PARTICIPATION

A. In General

The only rights of public participation granted by the OMA are the rights to be present and to listen and, if the meeting is by teleconference, the right to have available for review any agency materials (*i.e.*, the "agenda packet") to be considered at the meeting. Surely the public's right to review the agency materials under consideration at "live" meetings will also be implied.

B. The Right To Be Heard

The right of the public to speak and be heard at a municipal meeting does not come directly from the OMA. It comes from AS 29.20.020(a), which says, "The governing body shall provide reasonable opportunity for the public to be heard at regular and special meetings." The right of the public to speak at school board and committee meetings in municipal school districts comes from the same statute. The council or assembly, as the governing body, is required to provide an opportunity for the public to be heard at meetings of all municipal bodies, which would include municipal school boards, and committees.[40]

As to non-municipal school districts, the right of the public to speak can only be implied; there is no statute that guarantees it.

The reasonable opportunity to be heard does not mean there is a right to disrupt a meeting or to drone on endlessly. The body may certainly put reasonable limits on the right to speak. Public speaking may be limited to public hearings and other limited opportunities listed on the agenda. Efficiently run meetings often limit public testimony on agenda items to one slot early in the agenda, after which the governing body may proceed through the agenda without public interruption, limiting debate to only members of the body. The length of time that any individual or group may speak may also be limited. The manner in which a person may speak may be controlled in order to preserve the decorum of the meeting. Caution must be exercised, however, in limiting the content of what an individual says because of First Amendment protections for the right of free speech.

C. The Right To Attend

The right to attend is not often discussed, but it is an important component of the right to have a reasonable opportunity to be heard. For example, if the meeting is held at a remote hide-away retreat, difficult or expensive for the public to reach, how can the public's opportunity to participate be considered reasonable? Telephone conferences for the public may be practical in some circumstances, but not in others. A body covered by the OMA does not have the luxury of "getting away" for "peace and quiet" in order to get its work done. Reasonable opportunity to be heard does imply that reasonable accommodations will be made for the public to attend and participate.

VI. EXECUTIVE SESSIONS

It seems that no other facet of the OMA generates more questions at the local meeting level than those relating to executive sessions. An executive session is a portion of a public meeting from which the public is excluded because of the nature of the subject matter to be discussed. Implicit in the conclusion that certain subjects qualify for executive session is the conclusion that the danger of harm to public or private interests that may result from public discussion outweighs the public benefits of a public discussion. This involves a balancing of competing interests.

It is important to understand that an executive session is not a private or secret meeting. An executive session must begin and end in a public meeting. The public will be excluded only from the executive session portion of the meeting. The body itself will determine who will be invited into the executive session. The experience of the author is that usually the chief executive officer is included, along with the clerk and the attorney, and beyond that the body may invite others it feels may be helpful for its consideration of the matter at hand.

A. What Subjects Qualify For Executive Session?

1. In general

AS 44.62.310(c)(1) describes the subjects that may be discussed in executive session as follows:

> (a) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;
>
> (b) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
>
> (c) matters which by law, municipal charter, or ordinance are required to be confidential.
>
> (d) matters involving consideration of government records that by law are not subject to public disclosure.

The court has also held that some attorney-client communications qualify for executive session treatment.

2. Adverse financial impact

The first category of eligible subjects, matters having an adverse financial impact has important, limiting qualifiers attached. It must be *clear* that *immediate* public knowledge of the discussion will adversely affect government finances. A mere possibility, or even a probability does not suffice. A higher level of certainty of immediate negative impact is required.

One example that does seem to qualify under this test is the consideration of offers to settle litigation. A government body cannot candidly discuss settlement offers and counter proposals publicly without great risk of letting opposing litigants know how much the government is willing to pay or accept in settlement. All opportunities to bargain for a more favorable settlement will be lost when everyone knows what the government's bargaining position and bargaining points are. The only effective way to discuss settlement negotiations without harming the public financial interest is in executive session.

It is not enough to qualify for executive session to merely say the matter is one of "pending litigation" or a "financial matter," as is often heard. In order for an adverse financial impact executive session to withstand a court challenge, there must be facts in the record to enable the government to convince the court it was clear that immediate public knowledge of the particular issue to be discussed would harm the government's financial interests. There should be an on-the-record statement of the facts justifying such a conclusion. A court will make efforts to find that an executive session is not necessary, AS 44.62.312(b), so a firm factual foundation should be laid to support a claim that it was necessary.

3. Reputation and character

Subjects that tend to prejudice the reputation and character of any person may be discussed in executive session. The person does not have to be a government employee or applicant, but often it

is.

In *City of Kenai v Kenai Peninsula Newspapers, Inc.*,[41] the court considered an executive session called to discuss the applicants for a city manager position. The court said, "Ordinarily an applicant's reputation will not be damaged by a public discussion of his or her qualifications relating to *experience*, *education* and *background* or by a comparison of them with those of other candidates."[42] The court recognized an exception, however, for the discussion of *personal characteristics*, especially in the context of comparing several applicants, acknowledging that such discussion would "carry a risk that the applicant's reputation will be compromised."[43]

Our court shed more light on the meaning of this exception in *University of Alaska v. Geistauts*[44] where a university tenure committee held executive sessions to consider whether a professor should be granted tenure status. The court recognized such meetings are appropriate for executive sessions. Such a meeting was "likely to focus on perceived deficiencies in the candidate's qualifications. Tenure committee members may raise concerns for the purpose of discussion which would damage the applicant's reputation if aired publicly."[45] This statement shows not only a concern to protect the individual from embarrassment, but also a realization that an executive session will encourage a full and candid discussion of concerns that should be addressed.

In a footnote to the *Geistauts* decision, the court discussed this exception in a general employment context, observing that AS 44.62.310(c)(2) was designed to serve the same function as other states' exemption of employment matters from open meeting law requirements. "The reasoning behind the 'personnel matters' exception in other jurisdictions appears to be the avoidance of embarrassment to employees whose strengths and weaknesses will be evaluated."[46]

In a footnote in *Von Stauffenberg v. Committee For An Honest And Effective School Board*[47] the court noted that "there is no law which precludes public officials from discussing sensitive personnel matters in closed door executive sessions."

It should always be remembered, however, that the person whose reputation or character is in issue is entitled to specific notice of the executive session and has the right to demand that the discussion be public. If a demand for a public discussion is made by that person, then an executive session may not be held on that ground. See Section IV.E. above.

4. Matters required to be kept confidential

The third exception is a catch-all for other subjects that are required by law, municipal charter, or ordinance to be kept confidential. Note that laws authorizing, but not requiring, confidentiality might not satisfy this exception.

In addition to federal and state constitutions and laws, this exception specifically recognizes municipal charters and ordinances as valid sources of law requiring confidentiality. However, it is probably true that most municipalities have little or no law requiring confidentiality. Passing such ordinances may be controversial, but there are some subjects that might easily qualify for required confidential treatment without generating undue controversy, such as juvenile and individual student matters, collective bargaining negotiations, settlement negotiations, and attorney advice regarding litigation.

There has not been any Supreme Court decision in which the validity of a local ordinance requiring confidentiality has been challenged in the Open Meetings Act context. It is possible such a challenge might be made based on a claim the ordinance unduly restricts the public's right to know about the affairs of the government. Such a challenge might be successful if the court concludes the local government does not "need" the confidentiality when the interest of the public in knowing outweighs the governmental interest in keeping confidentiality. The Supreme Court already uses that balancing test in the public records context to determine whether local exemptions from the state law requiring disclosure are valid.[48] Because of this possibility, local ordinances requiring confidentiality should be cautiously adopted, and only where there is a legitimate need for privacy that is determined to

outweigh the public's strong interest in knowing what is going on with the government.

The confidential-by-law matter category was the basis for the Alaska Supreme Court holding that the common law attorney-client privilege may justify executive session treatment of some attorney-client communications.[49] This attorney-client privilege exception is discussed below in Section VI.A.6. Other common law privileges might conceivably provide a basis for additional executive session treatment under the court's analysis.

There is also a constitutional right of privacy[50] that requires confidential treatment of a subject when the individual in question has an expectation of privacy that society recognizes as reasonable. The full extent of the constitutional right of privacy is not well defined, and a complete discussion of the issue is beyond the scope of this publication. When the issue of invasion of privacy surfaces it is best to seek the advice of the public entity's attorney.

5. Confidential records

Matters involving government records that are protected from public disclosure by law may also be discussed in executive session. As a general rule, records of public entities (including municipalities and school districts)[51] are subject to public disclosure unless the law provides an exception.[52]

A number of exceptions are listed in AS 09.25.120(a), including records pertaining to juveniles unless disclosure is authorized by law, medical and related public health records, records required to be kept confidential by a federal law or regulation or by state law, and records compiled for law enforcement purposes if one of several conditions is met.

Our court has also been willing to consider whether municipal ordinances concerning confidential records qualify for common law exceptions from disclosure. The court's analysis focuses on the need for the exception, which requires weighing the public interest in favor of disclosure against the governmental interests and individual privacy interests favoring nondisclosure.[53] However, the government will bear the burden of justifying the exception, and public policy favors public access.[54] Under these constraints, new exceptions to the general rule of public disclosure are seldom approved.

Unless the exception authorizing nondisclosure of a record is statutory, it would be wise to seek the advice of the government's attorney before relying on the confidential record exception as a basis for an executive session.

6. Attorney-client privilege

Under limited circumstances communications between a governmental body and its attorney qualify for executive session treatment, according to *Cool Homes, Inc. v. Fairbanks North Star Borough*.[55] This exception is based on the attorney-client privilege, but for Open Meetings Act purposes, the privilege is defined narrowly.

The executive session exception is not available for general legal advice or opinion. It applies only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential. It is not even enough that the public body is involved in pending litigation.[56] Rather, the specific communication must be one that the confidentiality rationale of the privilege deems worthy of protection. The court cited a number of examples of attorney-client communications that might qualify for executive sessions: candid discussions of facts and litigation strategies; a conference on a decision to appeal; a conference about settlement; and advice about how a body and its members might avoid legal liability. A discussion generally about the "ins and outs and status" of litigation, and "what has happened in the year . . . as to court findings" did *not* qualify for executive session.[57]

B. Procedure For Executive Sessions

An executive session cannot be a totally secret meeting. Except in very limited circumstances,[58] an executive session is only one part of a public meeting. Several steps must be followed in calling an executive session.

1. Public meeting

Before an executive session may be held, the meeting must first be convened as a public meeting. In the public meeting, a motion to hold an executive session must be considered and determined by a majority vote of the body. As at any public meeting, the public has a right to attend and participate at this stage, including a reasonable opportunity to be heard under AS 29.20.020.

2. Notice

Because an executive session occurs at a public meeting, notice of the meeting must be given to the public according to the same requirements for any public meeting. See Section IV. above. This applies whether the executive session is to be held at a regular or a special meeting. That does not mean, in this author's view, that the public notice must specify that an executive session will be held. It is enough if reasonable public notice of the meeting has been given, including any subject matter notice that might be required. Even if the meeting agenda does not mention executive session, an executive session may be held if the body deems it necessary and the public has sufficient notice that the subject is on the agenda.

However, specific advance notice of the executive session is required in at least one circumstance. If a topic that might prejudice the reputation and character of any person is to be discussed in executive session, that person must be personally notified of the meeting and the contemplated executive session so the individual may exercise the right to demand a public discussion. See Section IV.E. above.

3. Motion calling for executive session

The motion calling for an executive session must clearly and specifically identify the subject matter to be discussed in the session,[59] and it should also identify the legal grounds being relied upon. A mere recitation of the statutory language (*e.g.*, "a matter that would prejudice a person's reputation") is not enough. The motion should at least identify the specific topic under consideration and any individuals whose reputation or character may be at issue (*e.g.*, "for a candid discussion and review of the strengths and weaknesses of the city manager.") Identifying the specific topic and naming any individual under consideration is important because, if challenged, the court will need to know what was to be discussed and why that particular topic qualified for executive session treatment. Anything not mentioned in the motion cannot be discussed in executive session unless it is auxiliary to the main question.[60] Furthermore, even though the public may not have a right to hear what is said in executive session, it does have a right to know what the session is about and why it is justified.

Because both the public and the court have an interest in knowing why an executive session is warranted, either the motion or the debate on the motion should explain why the matter legally qualifies as a legitimate executive session subject. For example, someone should say generally that personal characteristics will be discussed that might affect the individual's reputation, or say how knowledge of the matter will clearly have an immediate adverse effect on the government finances, or mention the law that requires confidentiality. Without such a discussion on the record, the chances of a successful legal challenge are greater.

However, it is not necessary to give so much information about the subject that the purpose of addressing it in private is defeated. For example, if the subject matter is something that might prejudice the reputation of a person, it is not necessary to publicly state details that will themselves cause harm to the person's reputation.

It is wholly inadequate when the motion only contains "short-hand" phrases, such as "pending litigation" or "attorney-client privilege" or "personnel matter." None of these phrases accurately describes subject matter that clearly falls within the allowable executive session subjects. Further, they fail to give adequate notice to the public or to the courts about what is to be discussed and why it qualifies. The courts are compelled to give a narrow construction to the executive session exceptions so unnecessary executive sessions may be avoided.[61] Every executive session motion should be made and debated with the thought in mind that this motion may be the one you have to justify to a very critical judge. Be free in your discussion about why the session is needed.

4. Recording and minutes

There is no statutory requirement to make minutes or a recording of the discussions in executive session.[62] However, at least one Superior Court judge has observed that one reason why he was unable to determine whether an executive session in question was legal was that no recording had been made of the session.[63]

Some public bodies do record executive sessions (the tapes are not released to the public) while others do not. Recording executive sessions will certainly make it easy for a court to decide whether the session was properly limited to executive session subjects. On the other hand, if the session was not properly conducted, the recording will also prove a challenger's case for illegality. But, if an executive session is not recorded, it may be harder for the government to prove it was done properly. In the absence of a record of what was discussed, a court might refuse to uphold an otherwise proper executive session.[64]

Recording executive sessions may remind the members of the body of their obligations under the law. It may actually serve to prevent violations of the OMA. While most members want to faithfully and legally perform the duties of their public office, those few who are not motivated by such a sense of public duty may be motivated by the knowledge their words are being recorded.

Attorneys and public officials in this state disagree about whether an executive session should be recorded. Considering both the advantages and disadvantages of recording executive sessions, it is the author's recommendation that such sessions be recorded. Based on the belief that most public bodies are trying to comply with the law and perform their duties in good faith and to the best of their abilities, such recordings will more often than not justify the executive session and prove it was properly convened and conducted. Until the law is clarified by the legislature or the Supreme Court to require such recordings, however, it is certainly a matter for local interpretation. There are legitimate reasons for not recording an executive session, and the failure to do so should not be considered an indictment of the governmental entity that chooses not to do so.

C. Limitations On Executive Sessions

1. Only main and auxiliary issues may be discussed

The discussion in executive session must be limited to those subjects described in the motion calling for the session and those subjects "auxiliary" to the main question.[65] The OMA does not attempt to define "auxiliary," and the Supreme Court has not done so either. According to *Webster's Third New International Dictionary (1981)*, "auxiliary" means "functioning in a subsidiary capacity."

Given the strong public policy favoring open meetings and *Webster's* definition, a court will likely require issues discussed to be closely related to, and subsidiary to the main question. It will probably not be enough that the topics are loosely related; a close and subsidiary relationship will likely be required. Thus, while the OMA gives the public body some flexibility to address subsidiary issues, it is only limited flexibility. This enables the public to have a fair idea about the subjects the governing body is discussing so the public may retain appropriate control over the government it created.[66]

The OMA requires as much as possible to be discussed publicly. It may be that on a given subject

some details should be discussed in executive session, while other facets of the same subject matter should be discussed in public session. The Supreme Court directed this result in *City of Kenai v. Kenai Peninsula Newspapers, Inc.*,[67] when it observed that public discussion of a city manager applicant's experience, education and background would not ordinarily endanger a reputation, while discussion of personal characteristics and habits might very well carry such a risk. The court's ruling authorized executive sessions *only* for "discussing the personal characteristics of the applicants." The same kind of direction was given in *Cool Homes, Inc. v. Fairbanks North Star Borough*[68] (attorney's general status report about litigation does not qualify for executive session, but legal advice about avoiding liability does qualify).

For maximum compliance with the OMA, a body should engage in public discussion as much as possible, and executive sessions should be used only when necessary and limited in scope as much as possible. This guideline, in fact, summarizes the whole purpose and intent of the OMA, and by following it the chances of a successful challenge to an executive session will be greatly diminished.

2. Generally, no action may be taken

Generally, no action may be taken in executive session.[69] Except as discussed below, the body may only discuss matters in executive session, and if any action must be taken on the subject, the body must reconvene in a public session to do so. The taking of "straw votes" in an executive session would probably be held to be a violation of this rule, as it tends to circumvent the policy of the OMA to require public body deliberations to be conducted in public. Reconvening in public session to announce a decision made in executive session is a clear violation of the OMA, unless one of the following exceptions applies.

3. Exception: directions on legal matters and labor negotiations

As an exception to the rule that no action may be taken in executive session, the OMA does authorize a public body to give directions in executive session on two kinds of matters. First, the body may direct its attorney about the handling of a specific legal matter. This makes it clear that the attorney may be instructed in executive session about things like settlement negotiations and legal strategies for a specific legal matter. Second, direction may be given to a labor negotiator about the handling of pending labor negotiations. This allows the body to instruct the negotiator in executive session about such things as bargaining positions and negotiating points.

4. Exemption: quasi-judicial decision-making

When a governmental body acting quasi-judicially meets solely to make a decision in an adjudicatory proceeding, it is entirely exempt from the OMA. See Section II.D.3. above. This means the decision-making may be done in private. Logically, this should mean that it is also permissible to conduct such decision-making in an executive session as part of a public meeting. Surely there is no harm resulting from making a decision in executive session that could have been made in total privacy. Therefore, it is the author's opinion that a court would approve using an executive session to take the action of coming to a final decision in an adjudicatory matter.

VII. REMEDIES AND PENALTIES FOR VIOLATIONS

Prior to the 1994 amendments, the law simply declared that "action taken contrary to [the Open Meetings Act] is void," meaning it was as though it had never happened. The court from time to time found that to be a harsh and impractical remedy,[70] and it struggled to find a way to manipulate the inflexible law to mesh with practical realities.[71]

Major revisions to the remedy portion of the OMA were adopted with the 1994 legislative amendments. The length of the remedy provisions was increased from one sentence to an entire page, and its complexity increased accordingly. Now the remedy portion of the act is very flexible, and an action in violation of the OMA will be declared void only after a court carefully considers many

factors and concludes the public interest in complying with the OMA outweighs the harm resulting to the public interest and the public entity from voiding the action. Procedural and other requirements were also introduced.

There is a huge difference in the remedies available for violations of the OMA by decision-making bodies and advisory-only bodies. These types of bodies will be discussed separately.

A. Decision-Making Or Policy-Making Body

Not all governmental bodies have the authority to make decisions or policies for the public entity. This Section VII.A. addresses remedies available for violations of the OMA only when committed by those bodies that do have authority to make decisions or policies for the entity. The distinction between decision- and policy-making bodies and advisory-only bodies is discussed in Section II.C. above.

An action in violation of the OMA by a decision-making or policy-making body is **voidable**. In other words, a court might declare that the action had no legal effect, but such a declaration is by no means automatic. Many things must be considered.

1. When a violation is alleged, attempt an informal cure

A governmental body that has violated or is alleged to have violated the OMA may attempt to cure the violation by holding another meeting that does comply with the OMA.[72] At that meeting the body must conduct a "substantial and public reconsideration" of the matters considered at the improper meeting. Such reconsideration cannot be superficial or a mere rubber-stamping of the previous action. It must be a genuine reexamination of the matter. Unless you have compelling reasons against a reconsideration, you should hold a reconsideration meeting that complies with the OMA whenever you think it is likely that an improper meeting occurred.

One of the factors a court will consider when it decides whether an action resulting from an improper meeting should be declared void is whether, and to what extent, the body engaged in such public reconsideration. Interestingly, even reconsideration that occurs after a lawsuit is filed will be taken into consideration by the court. Presumably, if the court determines that a reconsideration was not sufficiently substantial or public, then it may find the attempted cure was inadequate and declare the action void.

2. Improper action is voidable by court action

The OMA says that "action taken contrary to [the OMA] is voidable."[73] This means that the court has the power to declare the action void (like it never happened), but it is not required to do so in all cases. A lawsuit to void an action for violation of the OMA must be brought within 180 days after the date of the action. This helps to reduce delay and uncertainty about the finality of governmental actions. Furthermore, members of the governmental body may not be named in the lawsuit in a personal capacity; they may only be named in an official capacity.

If the court finds the action is void, the OMA gives the governmental body another chance to reconsider and act on the matter at another meeting held in compliance with the OMA. Exactly what that means about the status of the voided action between the time of the improper meeting and the reconsideration meeting is yet to be determined by the courts.

3. Action is voidable only after a public interest analysis

The OMA says that a court may declare an action void because of an OMA violation only after the court completes a public interest balancing test. Before declaring the action void, the court must consider all the circumstances and balance the public interest in complying with the OMA against the harm that would be caused to the public interest and to the public entity by voiding the action. Only if

the court finds the good to be accomplished by voiding the action outweighs the harm that it would cause may the court declare the action void.[74] In making that determination, the court must consider at least the following nine factors:

- the **expense** that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided,
- the **disruption** caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided,
- the degree to which the public entity, other governmental bodies, and individuals may be exposed to **additional litigation** if the action is voided,
- the extent of **previous consideration** of the subject by the governmental body held in compliance with the OMA,
- the amount of **time** that has passed since the challenged action was taken,
- the degree to which the public entity, other governmental bodies, or individuals have come to **rely on** the action,
- the extent to which the governmental body has engaged or attempted to engage in **public reconsideration** of the subject, either before or after a lawsuit is filed,
- the degree to which the violation of OMA was **willful, flagrant, or obvious**, and
- the degree of failure to comply with **policies** behind the OMA, *e.g.*, sovereignty of the people, openness of government, and the people's right to remain informed and participate.

In *Revelle v. Marston*,[75] a recent case interpreting the OMA in effect prior to the 1994 amendments, the court identified other factors that needed to be considered when weighing the public harm against the public good to be achieved by voiding an action taken in violation of the OMA. It seems likely the court will apply these factors to cases brought after the 1994 amendments, too, because they derive from the public policy behind the OMA, which remains unchanged. These additional factors are:

- whether the goal of maximizing informed and principled decision-making has been met,
- whether invalidation is necessary to deter future violations,
- whether the goal of encouraging public participation and input in the operation of government has been met, and
- the strength of the link or closeness (*i.e.*, the nexus) between the violation of the OMA and the challenged action.

B. Advisory-Only Body

This Section VII.B. applies only to those governmental bodies that have no authority to make decisions or policy for the public entity. The distinction between decision- and policy-making bodies and advisory-only bodies is discussed in Section II.C. above.

Concerning advisory-only bodies, the OMA says merely that the part of the act about voiding an action "does not apply."[76] The act fails to say what, if anything, does apply. However, since by

definition an advisory-only body cannot make decisions or policies, there is, by definition, no significant action to void.

Of more importance is the question of whether a violation of the OMA by an advisory-only body can have the effect of rendering void a subsequent action taken by a decision- or policy-making body in reliance on the advisory-only body's advice. Under the act prior to the 1994 amendments it is clear that reliance on such advice by an advisory-only body might render subsequent action by the public entity void.[77] However, when the degree of public entity reliance on the advice was insignificant, and the damage that would result from voiding the action was great, the court was reluctant to void the action.[78] Even before the 1994 amendments the court was considering all the circumstances and weighing the public benefit against the public harm. Therefore, reliance on procedurally defective advice of advisory-only bodies might or might not result in voiding the action. The result in a particular case will depend on the court's review of all the circumstances.

C. Remedies Fashioned By The Courts

If the court declares an action void, as the pre-1994 OMA prescribed for all actions in violation of the act, then the court may attempt to fashion a remedy that attempts to approximate the status quo at the time of the violation.[79] The courts have indicated some willingness to be flexible in fashioning specific remedies. In employment cases, for example, the court ordered reinstatement with back pay and reconsideration of tenure application in one case,[80] but in different circumstances held that reinstatement without back pay might be the proper remedy.[81] The fashioning of the proper remedy is closely related to the court's conclusion reached after weighing the factors relating to whether the action should be declared void.

D. Injunctive Relief

Although not mentioned in the OMA, the Supreme Court has also noted that an injunction may be issued forbidding future violations of the act. "This brings to bear the coercive judicial power in subsequent cases, in addition to the remedies otherwise provided by the statute."[82]

E. Recall

An elected official's violation of the OMA constitutes failure to perform the prescribed duties of office, one of the grounds for recall of an elected official.[83] The mere allegation of facts sufficient to establish a violation of the OMA is adequate ground to subject elected officials to recall under AS 29.26.250 (municipal officials, including municipal school board members) and AS 14.08.081 (regional school board members).[84]

APPENDIX: Alaska Open Meetings Act (February 1996)

Section

AS 44.62.310. Government meetings public

AS 44.62.312. State policy regarding meetings

Sec. 44.62.310. Government meetings public

Sec. 44.62.310. Government meetings public

(a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

(b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.

(c) The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential;

(4) matters involving consideration of government records that by law are not subject to public disclosure.

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents; or

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to the publication required by AS 44.62.175(a) in the Alaska Administrative Journal, the notice may be given by using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court shall consider at least the following:

(1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;

(2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;

(3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;

(4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

(5) the amount of time that has passed since the action was taken;

(6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;

(8) the degree to which violations of this section were wilful, flagrant, or obvious;

(9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).

(g) Subsection (f) of this section does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.

(h) In this section,

(1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions

for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members;

(2) "meeting" means a gathering of members of a governmental body when

(A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

(3) "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.

Sec. 44.62.312. State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

Footnotes

[1] The OMA also applies to certain branches of the state government and the University of Alaska, but those entities are not included in the scope of this publication.

[2] AS 44.62.310(h)(1).

[3] *University of Alaska v. Giestauts*, 666 P.2d 424 (Alaska 1983).

[4] *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.6 (Alaska 1985).

[5] *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

[6] *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.7 (Alaska 1985).

[7] AS 44.62.310(d)(6).

[8] *KILA, Inc. v. State*, 876 P.2d 1102 (Alaska 1994).

[9] AS 44.62.310(d)(1).

[10] AS 44.62.310(a).

[11] AS 44.62.310(d)(7).

[12] AS 44.62.310(d)(5).

[13] AS 44.62.310(h)(2).

[14] *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

[15] *Cahill v. City and Borough of Juneau*, Case No. 1 JU-81-1048 Civil (Alaska Super. Ct., Nov. 10, 1982) (Memorandum of Decision and Order). *See also , Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton*, 171 Cal. App. 3d 95, 214 Cal. Rptr. 561 (1985).

[16] 868 P.2d 919 (Alaska 1994).

[17] *Id.* at 1323 n.6. This comment by the Court was not necessary to its decision, and therefore might not be binding precedent. Nevertheless, it does reflect the attitude of the Court when interpreting the law before the 1994 amendments, and it may accurately reflect its current attitude.

[18] The telephone poll procedure might be justified only in true emergency situations, see Section IV.A. below, but even then its use is not recommended.

[19] *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.7 (Alaska 1985).

[20] *E.g.*, AS 29.20.230(b).

[21] *See* AS 29.20.130; AS 29.20.230(a); AS 29.20.240(a); AS 29.20.250(b); and AS 29.20.280(b).

[22] *See* AS 29.20.160(a); AS 29.20.220; and AS 29.20.250

[23] AS 29.20.250(b).

[24] AS 44.62.310(a).

[25] *Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994).

[26] AS 44.62.310(h)(2).

[27] *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

[28] AS 44.62.310(e).

[29] *Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994).

[30] 631 P.2d 67 (Alaska 1981).

[31] *Id.* at 81.

[32] *See* Taylor v. Van Brocklin, Case No. 3CO-90-46 Civil (Alaska Super. Ct., July 25, 1991) (Findings of Fact and Conclusions of Law and Order).

[33] AS 44.62.310(e).

[34] 672 P.2d 891 (Alaska 1983).

[35] *Id.* at 895.

[36] 868 P.2d 919 (Alaska 1994).

[37] *Id.* at 929, n.15.

[38] 666 P.2d 424 (Alaska 1983).

[39] *Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994). The court did not consider the practice perfect, however, and stated it would have been more meaningful had the citizen callers been provided with the materials under consideration.

[40] AS 44.62.310, AS 14.12.010, and AS 29.20.300.

[41] 642 P.2d 1313 (Alaska 1982).

[42] *Id.* at 1326. (Emphasis added.)

[43] *Id.*

[44] 666 P.2d 424 (Alaska 1983).

[45] *Id.* at 429.

[46] *Id.* at 429, n.7.

[47] 903 P.2d 1055, 1061 n.15 (Alaska 1995).

[48] *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584 (Alaska 1990); *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316 (Alaska 1982).

[49] *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993).

[50] Alaska Const., Art. I, Sec. 22.

[51] AS 09.25.220(2); and *Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191 (Alaska 1989).

[52] AS 09.25.110(a) and AS 09.25.120.

[53] *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Alaska 1982).

[54] *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584 (Alaska 1990).

[55] 860 P.2d 1248 (Alaska 1993).

[56] From the *Cool Homes* opinion it is not clear if the court intends to limit the scope of the attorney-client privilege exception to *pending* litigation. The case involved pending litigation, and the opinion does recognize that some other states do limit the exception to pending litigation, but the specific communications the court found justified the executive session, *i.e.*, how to avoid threatened legal liability, may be just as worthy of protection when litigation is not pending, but is merely threatened or anticipated. It is clear, however, that mere involvement in pending litigation will not justify having all communications about that litigation in executive session.

[57] *Id.* at 1259, 1261-1262.

[58] See Section II.D.3. above.

[59] AS 44.62.310(b).

[60] AS 444.62.310(b); *see also Cool Homes, Inc., v. Fairbanks North Star Borough*, 860 P.2d 1248, at 1259 n.18 (Alaska 1993).

[61] AS 44.62.312(b).

[62] AS 29.20.160(e) requires only that a journal of official proceedings be kept.

[63] *Pioneer Printing Co. v. Skannes*, 1KE-86-494 Civil (Alaska Super. Ct., Dec. 19, 1986) (Memorandum of Decision).

[64] *See, e.g., id.*

[65] AS 44.62.310(b).

[66] AS 44.62.312(a).

[67] 642 P.2d 1316 (Alaska 1982).

[68] 860 P.2d 1248 (Alaska 1993).

[69] AS 44.62.310(b).

[70] The court noted that the rule declaring actions void is "generally short, mechanistic, and inadequate to deal with the difficulties involved." *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886, 890 n.8 (Alaska 1984), quoting Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 Or. L. Rev. 519, 524 & n.25 (1976).

[71] *See, e.g., Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982); and *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886 (Alaska 1984).

[72] AS 44.62.310(f).

[73] *Id.*

[74] *Id.*

[75] 898 P.2d 922 (Alaska 1995).

[76] AS 44.62.310(g).

[77] *E.g., Revelle v. Marston*, 898 P.2d 922 (Alaska 1995).

[78] *E.g., Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

[79] *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886 (Alaska 1984).

[80] *University of Alaska v. Giestauts*, 666 P.2d 424 (Alaska 1983).

[81] *E.g., Revelle v. Marston*, 898 P.2d 922 (Alaska 1995).

[82] *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886, 889 n.5 (Alaska 1984).

[83] *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984).

[84] *Von Stauffenberg v. Committee For An Honest And Ethical School Board*, 903 P.2d 1055 (Alaska 1995), affirmed that violation of the OMA is grounds for recall, but held that the recall petition in that case did not allege facts sufficient to establish a violation of the act.

* * *

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State of Alaska
ETHICS INFORMATION FOR MEMBERS OF BOARDS AND COMMISSIONS
(AS 39.52)

INTRODUCTION

This is an introduction to AS 39.52, the *Alaska Executive Branch Ethics Act*. This guide is not a substitute for reading the law and its regulations. State board and commission members who have further questions should contact their board chair or staff.

The Ethics Act applies to all current and former executive branch public employees and *members of statutorily created boards and commissions.*

ETHICS ACT

SCOPE OF CODE (AS 39.52.110)

Service on a state board or commission is a public trust. The Ethics Act prohibits substantial and material conflicts of interest. Further, board or commission members cannot improperly benefit financially or personally from their actions as board or commission members. The Act does not, however, discourage independent pursuits, and it recognizes that minor and inconsequential conflicts of interest are unavoidable.

MISUSE OF OFFICIAL POSITION (AS 39.52.120)

Members of boards or commissions may not use their positions for personal gain or to give an unwarranted benefit or treatment to any person. For example, board members may not:

- use their official positions to secure employment or contracts;
- accept compensation from anyone other than the State for performing official duties;
- use State time, equipment, property or facilities for their own personal or financial benefit or for partisan political purposes;
- take or withhold official action on a matter in which they have a personal or financial interest; or
- coerce subordinates for his/her personal or financial benefit.

Terry knew that a proposal that was before the board would harm Terry's business competitor. Instead of publicly disclosing the matter and requesting recusal, Terry voted on the proposal.

Board member Mick has board staff employee Bob type an article for him that Mick hopes to sell to an Alaskan magazine. Bob types the article on State time.

IMPROPER GIFTS (AS 39.52.130)

A board member may not solicit or accept gifts if it could reasonably be inferred that the gift is intended to influence the board member's action or judgment. "Gifts" include money, items of value, services, loans, travel, entertainment, hospitality, and employment. *A form for reporting gifts is available at www.law.state.ak.us/ethics or from the board or commission staff.*

A gift worth more than $150 to a board member or the board member's family must be reported within 30 days if:

- the board member can take official action that can affect the giver, or
- the gift is given to the board member because he or she is on a state board.

The receipt of a gift worth less than $150 may be prohibited if it could reasonably be inferred that the gift is intended to influence the board member's action or judgment. Receipt of such a gift should be disclosed.

Any gift received from another government, regardless of value, must be reported; the board member will be advised as to the disposition of this gift.

This restriction on gifts does not apply to lawful campaign contributions.

The commission is reviewing Roy's proposal for an expansion of his business. Roy invites all the board members out to dinner at an expensive restaurant. He says it will be okay, since he isn't excluding any of the members.

Sam buys a holiday gift every year for Jody. Jody was recently appointed to a board, but Sam has no business that is up before the board.

IMPROPER USE OR DISCLOSURE OF INFORMATION (AS 39.52.140)

No former or current member of a board may use or disclose any information acquired through the board if that use or disclosure could result in a financial or personal benefit to the board member (or a family member), unless that information has already been disseminated to the public.

Sheila has been on the board for several years. She feels she has learned a great deal of general information about how to have a successful business venture. So she sets up her own business and does well.

Delores has always advised and assisted the other doctors in her clinic on their continuing education requirements. After Delores is appointed to the medical board, she discloses this role to the board and continues to advise the doctors in her clinic.

IMPROPER INFLUENCE IN STATE GRANTS, CONTRACTS, LEASES OR LOANS (AS 39.52.150)

A board member who can affect the award or administration of a State grant, contract, lease, or loan may not apply for, or have an interest in that State grant, contract, lease, or loan. This prohibition also applies to the board member's immediate family.

A board member (or a family member) may apply for or be a party to a *competitively solicited* State grant, contract or lease, if the board member does not serve in the same administrative unit awarding or administering the grant, contract, or lease *and* so long as the board member is not in a position to take official action in the award or administration of the grant, contract, or lease.

A board member (or a family member) may apply for and receive a State loan that is generally available to the public and has fixed eligibility standards, so long as the board member does not take (or withhold) official action affecting the award or administration of the loan.

Board members must report to the board chair any personal or financial interest (or that of a family member) in a State grant, contract, lease or loan that is awarded or administered by the agency the board member serves. *A form for this purpose is available at www.law.state.ak.us/ethics or from the board or commission staff.*

John sits on a board that awards state grants. John hasn't seen his daughter for nearly ten years so he figures that it doesn't matter when her grant application comes up before the board.

The board wants to contract out for an analysis of the board's decisions over the last ten years. Kim would like the contract since she has been on the board for ten years and feels she could do a good job.

IMPROPER REPRESENTATION (AS 39.52.160)
A nonsalaried board or commission member may represent, advise, or assist in matters in which the member has an interest that is regulated by the member's own board or commission, if the member acts in accordance with AS 39.52.220 and discloses the involvement in writing and on the public record, and refrains from all participation and voting on the matter. This section does not allow a board member to engage in any conduct that would violate a different section of the Ethics Act.

RESTRICTION ON EMPLOYMENT AFTER LEAVING STATE SERVICE (AS 39.52.180)
For two years after leaving a board, a former board member may not work on any matter on which the former member had personally and substantially participated while on the board. This prohibition applies to cases, proceedings, applications, and contracts but not to work on legislative measures or administrative regulations.

With the approval of the Attorney General, the board chair may waive this prohibition if a determination is made that the public interest is not jeopardized.

This section does not prohibit a State agency from contracting directly with a former board member.

The board has arranged for an extensive study of the effects of the Department's programs. Andy, a board member, did most of the liaison work with the contractor selected by the board, including some negotiations about the scope of the study. Andy quits the board and goes to work for the contractor, working on the study of the effects of the Department's programs.

Andy takes the job, but specifies that he will have to work on another project.

AIDING A VIOLATION PROHIBITED (AS 39.52.190)
Aiding another public officer to violate this chapter is prohibited.

AGENCY POLICIES (AS 39.52.920)
Subject to the Attorney General's review, a board may adopt additional written policies further limiting personal or financial interests of board members.

DISCLOSURE PROCEDURES

DECLARATION OF POTENTIAL VIOLATIONS BY MEMBERS OF BOARDS OR COMMISSIONS (AS 39.52.220)
A board member whose interests or activities could result in a violation of the Ethics Act must disclose the matter on the public record and in writing to the board chair who determines whether a violation exists. *A form for this purpose is available at www.law.state.ak.us/ethics or from the board or commission staff.* If a board member objects to the chair's ruling or if the chair discloses a potential conflict, the board members at the meeting (excluding the involved member) must vote on the matter. If the board chair or the board determines a violation would exist, the member must refrain from deliberating, voting, or participating in the matter.

When determining whether a board member is involved in a matter that may result in a violation of the Ethics Act, either the board chair or the board or commission itself may request guidance from the Attorney General.

ATTORNEY GENERAL'S ADVICE (AS 39.52.240-250)
Board chairs or the board itself may request a written advisory opinion from the Attorney General. These opinions are confidential. Versions without identifying information are available to the public.

A former board member may request a written opinion from the Attorney General interpreting the Ethics Act.

REPORTS BY THIRD PARTIES (AS 39.52.230)
A third party may report a suspected violation of the Ethics Act by a board member in writing and under oath to the chair of a board or commission. The chair will give a copy to the board member and to the Attorney General and review the report to determine whether a violation may or does exist. If the chair determines a violation exists, the board member will be asked to refrain from deliberating, voting, or participating in the matter.

COMPLAINTS, HEARINGS, AND ENFORCEMENT

COMPLAINTS (AS 39.52.310-330)
Any person may file a complaint with the Attorney General about the conduct of a current or former board member. Complaints must be written and signed under oath. The Attorney General may also initiate complaints from information provided by a board. A copy of the complaint will be sent to the board member who is the subject of the complaint and to the Personnel Board.

All complaints are reviewed by the Attorney General. If the Attorney General determines that the complaint does not warrant investigation, the complainant and the board member will be notified of the dismissal.

The Attorney General may refer a complaint to the board member's chair for resolution.

After investigation, the Attorney General may dismiss a complaint for lack of probable cause to believe a violation occurred. The complainant and board member will be promptly notified of this decision.

The Attorney General may file an accusation alleging a violation of the Ethics Act.

CONFIDENTIALITY (AS 39.52.340)
Complaints and investigations prior to formal proceedings are confidential. If the Attorney General finds evidence of probable criminal activity, the appropriate law enforcement agency shall be notified.

HEARINGS (AS 39.52.350-360)
An accusation by the Attorney General of an alleged violation may result in a hearing. A hearing officer appointed by the Personnel Board determines the time, place, and other matters. The parties to the hearing are the Attorney General, acting as prosecutor, and the accused public officer, who may be represented by an attorney. Within 30 days of the conclusion of the hearing, the hearing officer files a report with the Personnel Board.

PERSONNEL BOARD ACTION (AS 39.52.370)
The hearing officer's report will be reviewed by the Personnel Board. The Personnel Board is responsible for determining whether a violation occurred and for imposing penalties. An appeal may be filed by the board member in the Superior Court.

PENALTIES (AS 39.52.410-460)
When the Personnel Board determines a board member has violated the Ethics Act, the member must refrain from voting, deliberating, or participating in the matter. The Personnel Board may order restitution and may recommend that the board member be removed from the board or commission. If a recommendation of removal is made, the appointing authority will immediately remove the member.

If the Personnel Board finds that a former board member violated the Ethics Act, the Personnel Board will issue a public statement about the case and will ask the Attorney General to pursue appropriate additional legal remedies.

State grants, contracts, and leases awarded in violation of the Ethics Act are voidable.

Loans given in violation of the Ethics Act may be made immediately payable.

Fees, gifts, or compensation received in violation of the Ethics Act may be recovered by the Attorney General.

The Personnel Board may impose a fine of up to $5,000 for each violation of the Ethics Act. In addition, a board member may be required to pay up to twice the financial benefit received in violation of the Ethics Act.

Criminal penalties are in addition to the civil penalties listed above.

Please keep the following definitions in mind:

Administrative Unit - a division or other official subcategory of an agency.

Benefit - anything that is to a person's advantage regardless financial interest or from which a person hopes to gain in any way.

Board or Commission - a board, commission, authority, or board of directors of a public or quasi-public corporation, established by statute in the executive branch, including the Alaska Railroad Corporation.

Designated Ethics Supervisor - the chair or acting chair of the board or commission for all board or commission members and for executive directors; for staff members, the executive director is the designated ethics supervisor.

Financial Interest- any property, ownership, management, professional, or private interest from which a board or commission member or the board or commission member's immediate family receives or expects to receive a financial benefit.

Immediate Family - spouse; another person cohabiting with the person in a conjugal relationship that is not a legal marriage; a child, including a stepchild and an adoptive child; a parent, sibling, grandparent, aunt, or uncle of the person; and a parent or sibling of the person's spouse.

Personal Interest - the interest or involvement of a board or commission member (or a family member) in any organization or political party from which a person or organization receives a benefit.

For further information and disclosure forms, visit our web site at http://www.law.state.ak.us (Executive Branch Ethics) or please contact:

Alaska Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600
Attorney_General@law.state.ak.us

Revised 4/3/2001

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EXECUTIVE BRANCH ETHICS ACT

Responsibilities of Designated Ethics Supervisors for Boards and Commissions

1. Ensure that members and staff are provided a copy of the **ETHICS INFORMATION FOR MEMBERS OF BOARDS AND COMMISSIONS (AS 39.52)** -- and keep a supply of disclosure forms.

   ✍ **ETHICS INFORMATION FOR MEMBERS OF BOARDS AND COMMISSIONS (AS 39.52)**, disclosure forms, statutes and regulations are available from the Department of Law home page on the Internet at http://www.law.state.ak.us. If access to this is not available, please contact the Attorney General's office at 465-2412.

2. Investigate potential ethics violations, make decisions regarding conduct, and take action.

   ✍ You may request advice from the Department of Law State Ethics Attorney, Lisa Moritz Kirsch, 465-3600.

   ✍ Your request and the response of the Department of Law are confidential.

3. Keep employee disclosure statements (of potential violations, receipt of gifts, and grants/contracts/leases/loans) on file in your office. Disclosure of a gift received from another government must be forwarded to the Office of the Governor.

4. Provide a copy of a written determination made under AS 39.52.220 to the member of the board or commission. A copy must also be provided to the attorney general for review and can be attached to the quarterly ethics report. Both must submit reports.

5. Submit an ethics report (see example) to the Department of Law four times during the calendar year. The chair is the designated ethics supervisor for members and the executive director. The executive director is the designated ethics supervisor for the staff.

   ✍ Reports are due April 1, July 1, October 1, and January 1 for the preceding quarter. Send to Anne-Marie Palumbo, Legal Coordinator, Department of Law at MS 0300 [P.O. Box 110300, Juneau, AK 99811-0300].

MEMORANDUM

TO: Anne-Marie Palumbo
Legal Coordinator
Department of Law

DATE:

FILE NO.:

TELEPHONE NO.: (907) 465-3600

FROM:

SUBJECT: Executive Branch Ethics Act, A 39.52 Quarterly Report
[January – March, 2002]

[As designated ethics supervisor and executive director, and on behalf of the chair]

[As designated ethics supervisor and chair [executive director] for the _____, I wish to advise you that I have received no notifications of potential violations under the Ethics Act (AS 39.52) and have made no written determinations for this quarter.]

[As designated ethics supervisor and chair [executive director] for the _____, I have received ___ notification(s) of a potential violation under the Ethics Act (AS 39.52). I have attached a copy of the potential violation(s), in writing, from the [public officer, person, board or commission member or staff] along with my written determination for review by the attorney general. I [did] [did not] receive an advisory opinion from the Attorney General.]

ETHICS DISCLOSURE FORM

Outside Employment or Services Notification

To: _____, Designated Ethics Supervisor
(Department or Agency)

In accordance with AS 39.52.170(b), I am providing notice of my employment or provision of services for compensation outside the _____(agency).

Note: You are not required to disclose volunteer work unless it is a potential conflict with your state duties or you receive any type of compensation, including travel or meals.

This employment or service consists of the following (describe in detail, attach separate sheet as needed):

_____

_____

Hours and days of the week _____

If you work as an independent contractor or a consultant, please attach a list of your clients.

Note: If your outside job duties are the same or similar to your State service, or if you will be dealing with people or entities with whom you deal or may deal as part of your official duties, you must explain why no potential conflict exists between your outside employment and your official duties. If a potential conflict exists, you must refrain from taking any action until it is approved by your designated ethics supervisor. See AS 39.52.210.

I certify that I will not use or allow the use of any State owned/operated facilities, supplies, equipment, vehicles, or personnel time and effort for any employment outside State service, and that my outside duties will not affect my usual State duties or duty hours in this Department. I certify to the best of my knowledge that my statement is true, correct, and complete. In addition to any other penalty or punishment that may apply, the submission of a false statement is punishable under AS 11.56.200 - AS 11.56.240.

_____ _____
(Signature) (Date)

_____ _____
(Printed Name) (Division, Agency)

_____ _____
(Position Title) (Location)

_____ _____
(Work Supervisor's Signature) (Date)

_____ Approved _____ Disapproved

_____ _____
(Designated Ethics Supervisor's Signature) (Date)

Designated Ethics Supervisor: Provide a copy of the approval or disapproval to the employee. If the employment is disapproved or other action is necessary under AS 39.52.210 please attach a determination. A copy of the determination must be sent to the attorney general at the following address: State Ethics Attorney, Office of the Attorney General, Department of Law, P.O. Box 110300, Juneau, AK 99811

Employee: Please note that any change in your outside service or employment must be reported when it occurs, and also on or before July 1 of each year.

Updated May 10, 2000

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ETHICS DISCLOSURE FORM

Notification of Receipt of Gift
from Another Government

To: Director of Administrative Services, Office of the Governor

Through: _____, Designated Ethics Supervisor

In accordance with AS 39.52.130(e), I am providing notice of my receipt of a gift accepted on behalf of the state given to me or a member of my family from another government.

The gift is _____

_____

My estimate of its value is $ _____

I received it from _____

The date of receipt was _____

I received this gift under the following circumstances:

_____

_____

I can take or withhold the following official action that affects the giver:

_____

_____

The gift was received by a member of my family ☐ Yes ☐ No

I certify to the best of my knowledge that my statement is true, correct, and complete. In addition to any other penalty or punishment that may apply, the submission of a false statement is punishable under AS 11.56.200 - AS 11.56.240.

_____ _____

(Signature) (Date)

_____

(Printed Name) _____

(Location)

_____

(Position Title)

_____

(Division/Agency/Corporation/Board/Commission)

_____ _____

(Director of Administrative Services, Office of the Governor) (Date)

Determination of appropriate disposition: _____

_____

(12/98)

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ETHICS DISCLOSURE FORM

Notification of Receipt of Gift

To: _____, Designated Ethics Supervisor

In accordance with AS 39.52.130(b), I am providing notice of my receipt of a gift given to me or a member of my family with a value in excess of $150.00.

Was the gift given to you because you are a state employee or a member of a state board or commission? Yes ☐ No ☐

I can take official action that may affect the person who gave me the gift.
Yes ☐ No ☐

If the answer to both of these questions is no, you do not need to report this gift. If the answer to either question is yes, or if you are not sure, you must complete this form and provide it to your designated ethics supervisor.

The gift is _____

_____

My estimate of its value is $ _____

I received it from _____

The date of receipt was _____

I can take or withhold the following official action that affects the giver:

_____

_____

The gift was received by a member of my family ☐ Yes ☐ No

I certify to the best of my knowledge that my statement is true, correct, and complete. In addition to any other penalty or punishment that may apply, the submission of a false statement is punishable under AS 11.56.200 - AS 11.56.240.

_____ _____
(Signature) (Date)

_____
(Printed Name)

_____ _____
(Position Title) (Location)

_____
(Division/Agency/Corporation/Board/Commission)

_____ _____
(Designated Ethics Supervisor) Approved: _____ (initials) (Date)

If action is necessary under AS 39.52.210 or AS 39.52.220 please attach explanation.

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ETHICS DISCLOSURE FORM

CONFIDENTIAL
Notification of Potential Violation

TO: _____, Designated Ethics Supervisor
(Department or Agency)

In accordance with AS 39.52.210, I am notifying you of a situation which may result in a violation of the Code of Ethics. I am requesting your determination regarding a possible violation of:

____	AS 39.52.120,	Misuse of Official Position
____	AS 39.52.130,	Improper Gifts
____	AS 39.52.140,	Improper Use or Disclosure of Information
____	AS 39.52.150,	Improper Influence in State Grants, Contracts, Leases or Loans
____	AS 39.52.160,	Improper Representation
____	AS 39.52.170,	Outside Employment Restricted
____	AS 39.52.180,	Restrictions on Employment after Leaving State Service
____	AS 39.52.190,	Aiding a Violation Prohibited

The situation is as follows (please use a separate sheet for additional space):

_____

_____

I certify to the best of my knowledge that my statement is true, correct, and complete. In addition to any other penalty or punishment that may apply, the submission of a false statement is punishable under AS 11.56.200 - AS 11.56.240.

_____ _____
(Signature) (Date)

_____
(Printed Name)

_____ _____
(Position Title) (Location)

_____
(Division/Agency/Corporation/Board/Commission)

Note: A public employee who is involved in a matter that may result in a violation of AS 39.52.110 – 39.52.190 shall refrain from taking any official action relating to the matter until a determination is made under this section and immediately disclose the matter in writing to the designated ethics supervisor and the attorney general at the following address: State Ethics Attorney, Office of the Attorney General, Department of Law, P.O. Box 110300, Juneau, AK 99811.

(12/98)

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ETHICS DISCLOSURE FORM

Grants/Contracts/Leases/Loans Notification

To: _____, Designated Ethics Supervisor

In accordance with AS 39.52.150(d), I am reporting a personal or financial interest in a state grant, contract, lease, or loan (circle one) held by me or a family member and awarded, executed, or administered by the agency that I serve.

The grant, contract, lease, loan was awarded by:

_____

on _____(date).

Description of the state grant, contract, lease, or loan:

_____

_____

Recipient(s) of the state grant, contract, lease, or loan:

_____

_____

My financial or personal interest in the state grant, contract, lease, or loan:

_____

_____

Official action I can take regarding the state grant, contract, lease or loan:

_____

_____

I certify to the best of my knowledge that my statement is true, correct, and complete. In addition to any other penalty or punishment that may apply, the submission of a false statement is punishable under AS 11.56.200 - AS 11.56.240.

_____ _____

(Signature) (Date)

_____

(Printed Name)

_____ _____

(Position Title) (Location)

_____

(Division/Agency/Corporation/Board/Commission)

_____ _____

(Work Supervisor's Signature) (Date)

_____

(Designated Ethics Supervisor's Signature) Approved: _____ (initials) _____

(Date)

If action is necessary under AS 39.52.210 or AS 39.52.220 please attach explanation.

(12/98)

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